

CHARLES MUSIMBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 26 May 2015

Criminal Appeal

W. Chishiri, for the appellant
I. Muchini, for the respondent

HUNGWE J: The appellant is a member of the Zimbabwe Republic Police who assaulted a member of the public for no apparent reason besides his ego.

The circumstances surrounding the commission of the offence were given by the complainant, Simon Wedzerai. These are not in dispute on appeal since the appellant abandoned his appeal against conviction. Complainant was driving his motor vehicle at Stodart complex, Mbare, Harare. He intended to use a route which took him between two bars; Nyaumwe Bar and Providence Bar. On doing so he noticed two people playing on the road, one of whom was the appellant. He knew the appellant by sight as they both are residence of Mbare. He hooted for them to give him precedence. The appellant came to the motor vehicle and assaulted the complainant's passenger through an open window. The appellant was called off by his friend and left them. The complainant parked his motor vehicle. He noticed the appellant approach him when he got out of the motor vehicle. Without saying a word, the appellant head-butted the complainant and struck him with a beer bottle. He passed out and recovered at a local hospital. He sustained injuries and lost six teeth.

The appellant was sentenced to thirty-six months imprisonment of which twelve months were suspended for five years on the usual conditions of good behaviour. He appeals against the sentence.

The grounds advanced on behalf of the appellant are that the sentence imposed is so harsh as to induce a sense of shock; that the court erred in failing to consider community service when it had settled for an effective 24 months imprisonment; that the court failed to give due and proper weight to the mitigatory features of this case as advanced by the

appellant.

It is trite that overallly, the purpose of sentencing is to punish offenders for the offence of which they have been convicted. In doing so the courts consider that the seriousness of the crime should determine the severity of the sentence. In other words the seriousness of a particular offence has to be established in relation to other offences, and not in a vacuum. Proportionality between all offences is therefore required. This second principle of sentencing is refined by directly connecting it to two specific characteristics, namely the degree of harmfulness (or risk of harmfulness) of the offence and the degree of culpability of the offender. Roughly, this entails taking into account the amount of harm involved (or potentially involved) in the commission of the offence and the extent to which the offender can be blamed for this harm. Subject to this primary principle of proportionality, the court aim at an optimal combination in which the sentence should strive to (a) restore the rights of the victims; (b) protect society; and (c) afford the offender an opportunity of a crime-free life. This has been captured in the oft-stated maxim that the sentence must achieve a balance between the interests of society and those of the accused. In assessing sentence the sentencing court weighs these competing interests and hopefully achieve what passes as a fair sentence. Put differently the court must consider the proper weight of the personal circumstances of the offender and balance these with the interests of society. At the end of the process a consideration of both the aggravating features of the particular case as well as the mitigating ones ought to be reflected in the ultimate sentence. This process is not an easy one. Certain jurisdictions, as a result of the inherent disparity in sentences emanating from the courts have had to resort to sentencing guidelines for almost all offences in those jurisdiction in order to achieve some consistency. I am more than convinced that we should, in our own way, consider this route as an appropriate way to attain that same goal.

In our jurisdiction, sentencing is rightly considered to be the province of the trial court. Unless an appellant can demonstrate that the sentencing court acted on a wrong principle or committed a grave error or misdirection going to the root of the sentencing process, an appeal court has no right to interfere with a sentence which has been judiciously arrived at. The appeal becomes even more difficult where the sentence imposed falls within the ordinary range imposed in similar cases previously decided.

In the present case, the court considered that the appellant was a first offender; that he was employed married with children; that he has considerable assets and savings. On the other

hand the court was alive to the fact that the victim was subjected to unnecessary suffering for no apparent reason. The complainant lost six teeth. What the court a quo considered as even more aggravating was the fact that by his untoward behaviour the appellant had brought the name of the Zimbabwe Republic Police into disrepute. I am aware that he was not in uniform but the fact remains that he was known in his locality as a police officer. He was drunk but that was a voluntary act. He failed to hold his drink and cannot blame anyone for his bad behaviour. Police officers who resort to unprovoked acts of violence against the public who expect to be protected by the same officers must know that the courts take a dim view of that type of behaviour. Had there been some form of provocation one may have tempered the sentence with mercy. In this case the courts must meet the public's expectation of equal protection before the law and disabuse the notion that policemen are above the law. There is a line of cases in which harsher sentences were imposed on renegade police officers such that this court finds nothing to suggest that the sentence induces a sense of shock. I am therefore unable to find any misdirection on the part of the sentencing court in its approach to assessment of sentence.

In the result the appeal is dismissed in its entirety.

BERE J agrees

Rubaya & Chatambudza, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners